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January 21, 2003
P. McCulla's pers.

December 16, 2002

Fauquier County Board of Supervisors
40 Culpeper Street
Warrenton, VA 20186

Re. *Parcel No. 6899-29-5691-000, Route 17 and Independence Avenue
Bealeton, Virginia*

STATEMENT OF CLAIM

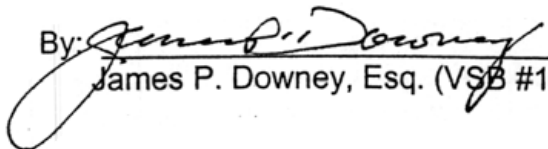
Dear Board Members:

Donald R. Tharpe, Trustee of The Donald R. Tharpe Trust, hereby presents his claim, pursuant to Va. Code Sec. 15.2-1145, for damages, for the decrease in the value of his 85 acres at Route 17 and Independence Avenue, in the amount of \$10,000,000, for diminished property value for removal of the property from the service district and denial of his rezoning application on November 18, 2002, and \$300,000 for expenses incurred in pursuing the rezoning application. The actions causing this diminished property value are in violation of Article I Section 11 of the Virginia Constitution. These actions also were taken in violation of Va. Code Sections 15.2-2232, 2239, 2286(7) and 2204. They were arbitrary and capricious and violated good zoning and planning practices. They exceeded the scope of the Board's authority under the Dillon Rule.

Accordingly, the total claim is \$10,300,000.

Respectfully submitted,

DONALD R. THARPE,
TRUSTEE OF THE
DONALD R. THARPE TRUST

By: 
James P. Downey, Esq. (VSB #14248)

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DRAFT

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

DONALD R. THARPE, Trustee of
The Donald R. Tharpe Trust
P.O. Box 240
Midland, Virginia 22728-0240

Petitioner,

JOHN DOE(S)
Midland, Virginia

Co-Petitioner(s),

v

THE BOARD OF SUPERVISORS OF
FAUQUIER COUNTY, VIRGINIA

Serve: Paul S. McCulla, Esq.
County Attorney
40 Culpeper Street
Warrenton, VA 20186

At Law No.

THE COUNTY OF FAUQUIER,
VIRGINIA

Serve: Paul S. McCulla, Esq.
County Attorney
40 Culpeper Street
Warrenton, VA 20186

Defendants.

**MOTION FOR DECLARATORY JUDGMENT, COMPENSATORY
DAMAGES, AND OTHER RELIEF**

Petitioners, by counsel, file this Motion for Declaratory Judgment that
certain actions taken by the Board of Supervisors of Fauquier County, Virginia,

on and before November 18, 2002, are invalid, and for compensatory damages, on the following grounds:

1. Petitioner Donald R. Tharpe, Trustee, is the owner of a tract of land situated in Lee Magisterial District of Fauquier County and identified as parcel No. 6899-29-5691-000, at Route 17 and Independence Avenue in the community of Bealeton, and consisting of some 85 acres ("the subject property").

2. On September 20, 1994, the Fauquier County Board of Supervisors adopted its 1992 through 2010 Comprehensive Plan for the County. That Plan includes a Chapter Six, entitled "Service Districts", which included a section designating the Bealeton Service District ("the Bealeton Service District Plan"). The subject property was designated as "Medium Density Residential" under the original (1994) Bealeton Service District Plan, and it was within the district boundary of the Service District. The Bealeton Plan stated that during the time period through year 2000, an additional 413 medium density residential units were planned, allowing for 2,370 additional population through year 2000, and an additional 1,783 in population through year 2010, bringing projected population in the Service District to 6,460 in the year 2010, equating to 3,076 additional dwelling units during the planning period through 2010.

3. The Plan further noted that available capacity at the Remington Sewage Treatment Plant would support the rate of growth expected during the planning period and would be adequate to serve the forecasted population. The Plan also noted that 22.2% of projected total County growth is planned for this

Service District in the Phase One time period and 13.7% in the Phase Two time period.

4. The Bealeton area is one of the few areas in the County which has adequate sewer capacity and a capacity to absorb residential and other growth in accordance with the adopted Service District Plan. The Remington Sewage Treatment Plant is a tertiary treatment plant adequate to comply with the State Water Control Board' Occoquan Policy which sets forth stringent sewage effluent standards in that watershed.

5 In January 1999 the County adopted an amendment to its Comprehensive Plan, designating the subject property for 25 acres of planned commercial and 60 acres of medium density residential use within the Bealeton Service District Plan, and within the Service District boundaries. Notwithstanding the designation of the subject parcel commercial and medium density residential in the Bealeton Plan, the property is classified as "R-A: Rural Agricultural" on the County zoning map and ordinance, which allows for only six dwelling units on the subject property

6. On December 18, 2001 Petitioner Tharpe submitted land development application to the Department of Community Development of Fauquier County requesting that 83 of the 85 acres of the subject property be rezoned from RA ("Rural Agricultural") to PDMU ("Planned Development Mixed Used District").

7 The application for rezoning was fully consistent with the adopted Comprehensive Plan and included development plan for an integrated mixed-

use project, including community-oriented services, office space, convenience shopping and a community center. It also included park and pedestrian connectors to the surrounding residential areas. The proposed residential mix consisted of town homes for entry level/first time homebuyers, midlevel and estate lots. An 11-acre park to preserve an existing stream corridor and a six-acre Greenbelt/Linear park also were proposed.

8. The rezoning application and development plan also showed vehicular access by way of Independence Avenue, proposing two secondary access points to the residential area to the east, one from Route 17 and one from Old Marsh Road, Route 837. The plan also proposed four additional access points from Independence Avenue, two for the neighborhood center and two for the residential area.

9. The conceptual design plan for the subject property proposed in the rezoning application thus included an extension of Independence Avenue, future entry points for both Old Marsh Road and a new access road, and areas of parkland. These public utility features are not yet shown on the adopted Comprehensive Plan.

10. The proposal was reviewed by County staff and was advertised for public hearings and work sessions during the summer of 2002, and was acted upon by the Board of Supervisors on November 18, 2002.

11. While the rezoning application was pending, a citizens' committee, known as the "Bealeton, Opal, Remington Citizens' Committee ("BOR"), appointed by the Board of Supervisors, met to review the Bealeton, Opal and

Remington Service District plans for possible revisions and amendments to the Comprehensive Plan. The citizens' committee was advertised as having been appointed or designated by the Board of Supervisors and was not an advisory committee to the Planning Commission. This citizens' committee did not conduct its meetings or studies within the purview of any laws or regulations, nor in accordance with any adopted or published procedures, by-laws or guidelines.

12. Despite request and offer to be a member of the committee, and notwithstanding Petitioner's substantial interest as landowner in the Bealeton Service District, Petitioner was excluded from membership on the citizens' committee. The citizens' committee conducted its business outside of the Virginia Freedom of Information Act and other statutes designed to protect property owners from arbitrary infringements upon or denial of their property rights.

13. The rezoning application was reviewed by the Planning Commission and Board of Supervisors concurrently with their consideration of the citizens' committee's recommendation with respect to the Bealeton Service District. The citizens' committee recommendations were advertised if they were the work of a lawfully constituted public body, which they were not.

14. After various meetings and hearings initiated by the citizens' committee, the Planning Commission recommended removal of the subject property from the Bealeton Service District and denial of the rezoning request. The Board of Supervisors acquiesced in that recommendation, and amended the Comprehensive Plan to remove the subject property from the District.

Thereupon, the Board summarily denied Petitioner's rezoning request on November 18, 2002.

**COUNT ONE: FAILURE TO FOLLOW STATUTORY
PROCEDURES IN AMENDING THE COMPREHENSIVE PLAN
AND IN REVIEWING THE REZONING APPLICATION**

The rezoning application proposed certain changes to public streets and designation of Parkland. These features were not shown on the adopted Comprehensive Plan and were within the purview of Va. Code Sec. 15.2-2232, which, among other things, requires the Planning Commission to give special public notice of such proposals and to decide specifically whether such features will be shown on the Comprehensive Plan. The Planning Commission was required to give written reasons for its disapproval of these specific proposals, entitling the applicant to appeal from a disapproval to the Board of Supervisors. This procedure was not followed in the consideration either of the Comprehensive Plan Amendment or of the rezoning request, rendering the specific basis for the Planning Commission's recommendations indefinite, resulting in serious uncertainty and prejudice to Petitioner, and depriving him of his right to have his application considered in accordance with procedures set forth by statute.

The deletion of the subject property from the Bealeton Service District boundary eliminated infrastructure which had been approved for this site, thereby removing a feature provided and shown on the adopted Service District Plan without complying with the procedures in Va. Code Sec. 15.2-2232.

7. This process resulted in amendment to the district boundary of the Bealeton Service District, deleting the subject property from that District, and revoking the planned commercial and residential density and the infrastructure previously held out as being available to the subject property.

8. The process by which the Comprehensive Plan was amended was in violation of Va. Code Sec. 15.2-2286(7). The amendment to the Bealeton Service District boundaries was not initiated by proper Resolution stating the nature of the public necessity, convenience, general welfare or good zoning practice which required the amendment or change to the district boundaries of the Bealeton Service District.

1. The amendment to the Comprehensive Plan by which the subject property was deleted from the Bealeton Service District Plan was not initiated by direction from the Board of Supervisors to the Planning Commission that the Commission prepare amendment, after formal written request by the governing body as required by Va. Code Sec. 15.2-222. Instead, the Board of Supervisors delegated this role to citizens committee of 25 people, from which Petitioner deliberately was excluded impermissibly circumventing the Planning Commission and depriving the Planning Commission of oversight authority over the Plan amendment process.

20. The action by the Board of Supervisors in delegating a Comprehensive Plan amendment to improperly constituted citizens committee with no legal or fiduciary status exceeded the Board's authority and

violated specific statutory provisions requiring such proposed amendments to be directed by the Board to the Planning Commission itself.

The public hearings on the Plan amendment and rezoning application did not comply with applicable Code Sections regarding public notice, in that property owners, including John Doe Co-Petitioner(s), entitled to notice did not receive proper written notice of the hearings; and the certifications of such compliance were defective and incomplete. Upon information and belief, such John Doe Co-Petitioners are aggrieved in a direct, pecuniary manner and by the denial of their ability to participate in the planning and zoning process, which implicates significant property interests.

WHEREFORE, Petitioner moves this Court declare the action of the Board of Supervisors on November 18, 2002, changing the Bealeton Service District boundary, revoking development density and infrastructure from the subject property and denying the application for rezoning were invalid as being in violation of prescribed statutory procedures.

**COUNT TWO: DEPRIVATIONS OF PROPERTY WITHOUT DUE PROCESS
OF LAW AND DENIAL OF EQUAL PROTECTION UNDER THE VIRGINIA
CONSTITUTION, BY ARBITRARY AND CAPRICIOUS AMENDMENT OF
COMPREHENSIVE PLAN AND DENIAL OF REZONING APPLICATION**

Petitioner incorporates all previous allegations.

The amendment of the Comprehensive Plan was arbitrary, capricious and confiscatory. The change of the Bealeton Service District Boundary to exclude the subject property, to deprive it of public utilities

previously held out to it and to reduce its permitted development density reduced its fair market value by millions of dollars.

24. In view of the difference between the fair market value of the property before and after the Comprehensive Plan amendment, the actions of the Board and County on and before November 18, 2002, worked a deprivation of all economically viable use of the property. No reasonable use, in view of existing market conditions, remains available to the property.

In view of the designation of the property within the Bealeton Service District and its specific designation for Medium Density Residential and Commercial within the context of the adopted plan for the property, its continuing classification within RA Zoning District was not reasonable and was without a valid public purpose.

The denial of the rezoning was prompted by the removal of the parcel from Bealeton Service District. This denial of the rezoning was predicated on the amendment to the Comprehensive Plan. This denial was not founded on proper considerations or procedures, was arbitrary and capricious, bore no relation to valid objectives, and deprived Petitioner of property without due process of law.

The denial of the rezoning was exclusionary in its effects, because it prevents the development of the subject property with housing which would be suitable to middle-income homebuyers, resulting in a further scarcity of housing product for potential purchasers in that economic classification, and constricting the availability of such housing product in relation to demand, contrary to the

County's affordable housing policies, and contrary to good zoning and planning practices.

28. The denial of the rezoning was discriminatory and was prompted by considerations which favored other economic interests in the Bealeton area and treated the applicant differently from others similarly situated, thereby depriving Petitioner of Equal Protection of the Laws as secured by the Virginia Constitution.

29. Petitioner had the right to be considered under the existing Comprehensive Plan in effect as of the date of his application. The amendment to the Comprehensive Plan which was used as a justification for the denial of public utilities and the rezoning application, was prompted by the rezoning application itself, rather than by any considerations substantially related to the public health, safety, and welfare, or to good zoning and planning practices.

30. The denial of the rezoning was arbitrary, capricious, and confiscatory and violated good planning and zoning practices, and deprived Petitioner of property without Due Process of Law as secured by the Virginia Constitution.

31. The actions of the Board and County recited heretofore have resulted in the taking or damage of Petitioner Tharpe's property in the amount of Ten Million Three Hundred Thousand Dollars (\$10,300,000), including expenses incurred in the rezoning application, without due process of law, in violation of Article I, Section 11 of the Virginia Constitution. Petitioner presented this claim to the Board on December 16, 2002, but the claim has not been allowed to be paid.

WHEREFORE, Petitioner moves this Court: (a) declare invalid, void and of no effect the action of the Defendant Board of Supervisors in amending the Comprehensive Plan to exclude the subject property from the boundaries of the Bealeton Service District, and in denying Petitioner's rezoning application; (b) order the Board of Supervisors to reconsider any rezoning application by Petitioner Tharpe in accordance with the Comprehensive and Service District Plan as it existed through November 17, 2002, and (c) declare the denial of the rezoning request invalid, void and of no effect, and vacate the said action denying the rezoning request; (d) award compensatory damages to Petitioner in the sum of Ten Million Three Hundred Thousand Dollars (\$10,300,000) and for such other and further relief as to the Court may appear just.

Respectfully submitted,

DONALD THARPE, TRUSTEE
OF THE DONALD R. THARPE TRUST
and JOHN DOE(S)
By Counsel

WALSH, COLUCCI, LUBELEY, EMRICH & TERPAK, P.C.

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